

ANN MARIE SMITH )  
 Claimant )  
 VS. )  
 ) Docket No. 222,061  
 COFFEYVILLE REGIONAL MEDICAL CENTER )  
 Respondent )  
 AND )  
 )  
 KANSAS HOSPITAL ASSOCIATION WCF, INC. )  
 Insurance Carrier )

What is the nature and extent of claimant's injury and/or disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

The claimant began working for the respondent as a CNA on January 23, 1996. On May 11, 1996, while attempting to lift a patient, claimant suffered an injury to her low back. Claimant described it as a "pop" in the low back. Claimant advised her supervisors of the accident, filed an accident report, and sought medical treatment with Dr. Paul Sandhu. Claimant continued performing her regular job until July 10, 1996, at which time she suffered a temporary aggravation of her condition. Claimant was off work for approximately two weeks and then returned to light duty work, where she remained until February 27, 1997. Claimant was initially diagnosed with musculoskeletal pain and lumbar spasms. X-rays showed narrowing at L4-5.

When claimant was examined by Dr. Sandhu on February 27, 1997, Dr. Sandhu diagnosed chronic lumbosacral sprain, prescribed physical therapy, and recommended claimant be taken off work. Claimant continued with conservative care, including a lumbar myelogram and CT scan, and was ultimately diagnosed with a central disc herniation at L4-5 and bulging disc at L5-S1, and surgery was recommended.

By May 1997, claimant was referred to Robert L. Eyster, M.D., an orthopedic surgeon, who requested an MRI and diagnosed disc fragments located at L5-S1. Claimant underwent a discectomy at L5-S1 with exploration at L4-5 on June 13, 1997. Dr. Eyster continued treating claimant and released her in December 1997, March 1998, and ultimately April 30, 1998. At that time he assessed claimant a 16 percent whole body functional impairment and recommended she lift no more than 5 to 10 pounds and advised against prolonged sitting, prolonged bending, and prolonged twisting.

While being treated by Dr. Eyster, claimant was also examined by Edward J. Prostic, M.D., an orthopedic surgeon, in Overland Park, Kansas. During this examination on January 5, 1998, Dr. Prostic found claimant to have reached maximum medical improvement, although Dr. Prostic described this more as a plateau rather than maximum medical improvement. He did indicate claimant could improve with additional treatment. However, at that time he felt claimant to be functionally unemployable and assessed claimant a 28 percent permanent partial functional impairment to the body as a whole, based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Dr. Prostic was provided with a copy of a task analysis performed by Karen Terrill. He reviewed the task analysis and found claimant had lost the ability to perform 61 percent of her former work tasks. He diagnosed post-operative epidural fibrosis and found

claimant unable to return to any type of gainful employment at that time. In his opinion, claimant was still temporarily totally disabled.

On July 6, 1998, pursuant to the order of the Administrative Law Judge, claimant underwent an independent medical examination with George Fluter, M.D. a board-certified physical medicine and rehabilitation specialist in Wichita, Kansas. Dr. Fluter found claimant to be in no acute distress, although she did have a limited range of motion with pain. He was unable to assess claimant's muscle strength because of give-way weakness. He found no atrophy or muscle wasting, and no clonus or long tract signs. Clonus and long tract signs indicate upper motor neuron injuries or difficulties. He did find wide-spread pinch tenderness and overreaction to his examinations, which he felt suggested a nonradicular source of claimant's back pain.

Dr. Fluter assessed claimant with an 11 percent whole body functional impairment based upon the AMA Guides, Fourth Edition, and returned her to work primarily in the light level of physical activity. He opined that claimant should limit herself to 20 pounds occasional lifting, 10 pounds frequent lifting. In reviewing Dr. Eyster's 5 to 10 pound limitations, he assumed Dr. Eyster meant that as a maximum amount so he noted there would be a difference between his restrictions and those of Dr. Eyster's. In reviewing the tasks list provided from Karen Terrill, he opined claimant was incapable of performing 11 of the 35 tasks, which would represent a 31 percent loss of task performing abilities. He found claimant to be at maximum medical improvement at the time of his examination.

After being examined by Dr. Prostic and released by Dr. Eyster, claimant was offered an accommodated job with respondent on May 10, 1998. This job was titled "therapeutic activities worker", which would normally require lifting of at least 50 pounds. However, Karen Loeb, the nurse manager for respondent's behavioral health unit, testified that the requirement in claimant's case had been modified and she would not be required to exceed the restrictions provided by Dr. Eyster of 5 to 10 pounds lifting. Claimant was scheduled to work 40 hours per week at \$6.44 per hour, which would equate to an average weekly wage of \$257.60 per week. Claimant returned to work with respondent on approximately May 10, 1998, although the exact date is not contained in the record. Claimant continued working for respondent until October 23, 1998. During this period, claimant did not regularly work a 40-hour work week, even though no doctor restricted her to working less than 40 hours per week. Claimant's employment record reflects numerous absences and call-ins during that period. Claimant acknowledged in a handwritten note to Ms. Loeb that the job requirements did not exceed her restrictions or limitations. However, claimant alleged she was in significant pain and unable to perform the duties of the job. As a result of her excessive absenteeism, claimant was terminated by respondent on October 23, 1998.

Ms. Loeb testified that it was respondent's intention to keep claimant employed in that job on a permanent basis had claimant met the aide requirements set forth by respondent.

Sometime later it was discovered that, while released to work for respondent, claimant had applied for and was receiving Social Security disability benefits, unbeknownst to any of the parties or the claimant's attorney.

Dr. Fluter, after reviewing the job responsibilities of the therapeutic activities worker, testified that claimant could perform that job within either his or Dr. Eyster's restrictions. After being terminated from respondent's position, claimant applied for employment at Medical Lodge in Coffeyville, Kansas, as a CNA. She also applied as a cashier at a local IGA store. Claimant has filed no other applications with any employer or potential employer since that time. At the time of the regular hearing, claimant was unemployed and not actively seeking employment, alleging that she was unable to work due to the severe pain in her low back.

The Award of the Administrative Law Judge granted claimant a 63 percent loss of task abilities and 100 percent loss of wage earnings. This resulted in an 81.5 percent work disability beginning May 11, 1996, through May 10, 1998, at which time claimant was deemed to have returned to work for the respondent in a part-time position, earning \$29.47 per week and, thus, entitled to a 74.5 percent work disability through October 23, 1998. Thereafter claimant was awarded an 81.5 percent work disability.

#### **CONCLUSIONS OF LAW**

In the proceedings of the Workers Compensation Act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation, proving the various conditions upon which claimant's right depends by a preponderance of credible evidence. See K.S.A. 1998 Supp. 44-501, and K.S.A. 1998 Supp. 44-508(g).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The medical evidence of Dr. Eyster, Dr. Fluter, and Dr. Prostig establishes that claimant has suffered a significant injury to her low back resulting in an L4-5 laminectomy. Post-operatively, claimant has developed epidural fibrosis. Dr. Prostig acknowledged at the time of his January 5, 1998, examination that claimant had reached a plateau of maximum medical improvement. He went on to say, however, that with additional treatment claimant could still improve and his functional impairment would then be modified. Dr. Fluter, on the other hand, examined claimant in July 1998, and found claimant at maximum medical improvement. The Appeals Board, therefore, finds that Dr. Fluter's opinion, that claimant has suffered an 11 percent whole body functional impairment

as a result of the injuries, is the more credible medical opinion and is adopted by the Appeals Board for the purpose of this award.

K.S.A. 1996 Supp. 44-510e defines permanent partial disability as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

With regard to the nature and extent of the injury and/or disability, the Appeals Board must consider respondent's contentions that claimant has violated the principle set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proper job that the worker had the ability to perform. In this instance, claimant was offered and accepted an accommodated position with respondent which paid a comparable wage. However, claimant regularly missed her employment responsibilities, displaying a less than satisfactory attendance record between May 1998 and October 23, 1998, at which time respondent terminated claimant for absenteeism. Claimant alleged an inability to perform this work due to ongoing and significant pain. However, Dr. Flutter, during his examination of claimant on July 6, 1998, found no atrophy, no muscle wasting, no clonus and no long tract signs indicating no evidence of upper motor neuron problems. He did find evidence of widespread pinch tenderness and overreaction to his tests, which he suggested were nonradicular pain complaints. In reviewing the job tasks offered by respondent, Dr. Flutter found the claimant capable of performing those tasks within the limitations placed upon her by both he and Dr. Eyster, the treating physician. The Appeals Board finds that claimant was able to perform the accommodated job. Therefore, claimant's return to work with respondent and subsequent failure to attend to her employment duties, resulting in her termination, violate the policies set forth in Foulk. See also Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

In addition, the Appeals Board must consider whether the claimant violated the policies in Copeland v. Johnson Group, Inc., 24 Kan. App.2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals held that if a claimant, post-injury, did not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based

upon the evidence and the record as to claimant's wage-earning abilities. The Appeals Board finds, in this instance, that claimant's two attempts to obtain employment after her termination of employment with respondent do not constitute a good faith effort to obtain employment and, therefore, a wage must be imputed.

No doctor in this matter has limited claimant to working less than 40 hours per week, although Dr. Prostic, at the time of his examination, found claimant to be unemployable. He went on to state that he felt claimant was temporarily totally disabled but that in time could improve. Dr. Flutter, the last doctor to examine claimant, found claimant capable of returning to work in a light-duty capacity with no limitations as to claimant's ability to work 40 hours per week. In this instance, respondent offered claimant a job that paid a comparable wage to that which claimant was earning at the time of the injury. In addition, the Appeals Board finds that claimant would be capable of earning minimum wage in employment in a light-duty capacity were claimant to put forth the effort to obtain same. Minimum wage, in this instance, would pay claimant in excess of 90 percent of her average weekly wage and pursuant to K.S.A. 1996 Supp. 44-510e would limit claimant to her functional impairment of 11 percent to the body as whole.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish, dated March 2, 1999, should be, and is hereby modified, and an award is granted in favor of the claimant, Ann Marie Smith, and against the respondent, Coffeyville Regional Medical Center, and its insurance carrier, Kansas Hospital Association WCF, Inc., for an injury suffered on May 11, 1996, and based upon an average weekly wage of \$210.09 per week for an 11% permanent partial disability to the body as a whole.

Claimant is entitled to 52.71 weeks of temporary total disability compensation at the rate of \$140.07 per week in the amount of \$7,383.09, followed by 41.5 weeks of permanent partial disability compensation at the rate of \$140.07 per week in the amount of \$5,812.91, for a total award of \$13,196.00, all of which is due and owing and ordered paid in one lump sum, minus any amounts previous paid, at the time of this award.

Claimant is further entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it does not contravene the provisions of the appropriate version of K.S.A. 44-536.

Any fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Deposition Services	
Deposition of Ann Marie Smith	\$191.20
Deposition of George Fluter, M.D.	Unknown
Hostetler & Associates, Inc.	
Deposition of Edward Prostic, M.D.	\$125.35
Bannon & Associates	
Deposition of Karen Crist Terrill	\$123.10
Karen Starkey, CSR	
Transcript of Regular Hearing	Unknown
Shaun J. Higgins, RPR-CM	
Deposition of Karen Loeb	\$117.40

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 1999.

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BOARD MEMBER

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**DISSENT**

I would affirm the Administrative Law Judge's Award. Unlike the Appeals Board, Administrative Law Judge Frobish had the opportunity to observe Ms. Smith testify and, therefore, assess her credibility. The Administrative Law Judge found Ms. Smith's testimony credible that she was missing work due to severe pain. That testimony is also

supported by Dr. Prostic's opinions regarding Ms. Smith's condition and somewhat supported by the other doctors' opinions as to her permanent restrictions and limitations.

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**BOARD MEMBER**

- c:     Joseph Seiwert, Wichita, KS  
       Wade A. Dorothy, Lenexa, KS  
       Jon L. Frobish, Administrative Law Judge  
       Philip S. Harness, Director